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No. 06-797

In the

Supreme Court of the United States

UNITED STATES FOREST SERVICE, et al.,
Petitioners,

v.

EARTH ISLAND INSTITUTE, et al.,
and
SIERRA PACIFIC INDUSTRIES,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CALIFORNIA FORESTRY ASSOCIATION, TUOLUMNE COUNTY ALLIANCE FOR RESOURCES AND ENVIRONMENT, SIERRA RESOURCE MANAGEMENT, INC., TUOLUMNE COUNTY CHAMBER OF COMMERCE, AND CALIFORNIA FOREST COUNTIES SCHOOLS COALITION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The question presented is whether the court of appeals erred in ordering a preliminary injunction, including by:

a. Relying on declarations filed by Respondents in the district court, rather than confining its review to the administrative record, in determining that Respondents had shown a likelihood of success on the merits;

b. Holding that Respondents could satisfy the "irreparable injury" prong of the test for obtaining a preliminary injunction by showing only a "possibility" of such injury; and

c. Discounting competing interests in the use of Forest lands under multiple use principles, and the Forest Service's balance of those competing uses, in weighing the balance of harms and the public interest.

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Under Supreme Court Rule 37, Pacific Legal Foundation, California Forestry Association, Tuolumne County Alliance for Resources and Environment, Sierra Resource Management, Inc., Tuolumne County Chamber of Commerce, and California Forest Counties Schools Coalition respectfully submit this brief amicus curiae in support of the petition for writ of certiorari filed by the United States Forest Service, et al. Written consent was granted by counsel for all parties and lodged with the clerk of this Court.

Pacific Legal Foundation (PLF) was founded over thirty years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF advocates limited government, individual rights, and free enterprise. PLF has litigated numerous cases addressing the need for a balanced approach to environmental regulation.[2]

California Forestry Association (CFA) is a nonprofit, nonpartisan organization dedicated to sustainable uses of renewable resources and responsible forestry. CFA's

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

[2] PLF attorneys represent the TuCARE, SRM, the Chamber, and the Coalition in the district court in this action as Defendant-Intervenors to contest the issuance of preliminary injunctive relief in favor of Respondents Earth Island Institute, et al., without the latter having first posted substantial bond in accordance with Rule 65(c) of the Federal Rules of Civil Procedure.

membership includes forest landowners, forestry professionals, loggers, manufacturers, wholesalers, and retailers who are engaged in the production and distribution of wood products. Association members are committed to protecting and enhancing the natural life cycle of California's forests. CFA's members own 3.8 of the 7.4 million acres of private timberland in California. They supply wood resources by contracting to purchase and harvest significant amounts of timber from public lands including the National Forests. Yet importantly, only 16 million of California's 38 million forested acres are commercially productive, with less than one percent of the total productive California forestland harvested annually, and seven trees planted for every tree harvested.

Tuolumne County Alliance for Resources and Environment (TuCARE) is a community-based nonprofit organization founded in 1988. Its membership is made up of a cross-section of the Tuolumne County, California, community, including local business persons, educators, retirees, and those actively engaged in working on a daily basis with the region's natural resources. TuCARE supports conservation and the multiple-use of the many natural resources on federal lands. TuCARE firmly believes that man must ensure that resources are available both now and in the future for the benefit of all. TuCARE seeks stability for the region's resource industries to ensure the economic soundness of local communities. The stoppage of salvage timber sales, like those at issue in this case, prevents the proper thinning and management of forests and thus leads to needless increase in threats to both man and species by catastrophic wildfire.

Sierra Resource Management (SRM) is a small timber harvesting company based in the City of Sonora in Tuolumne County, California. The company was incorporated in 1993 and employs some twenty-five people. SRM depends upon local saw mills to market its products; those mills depend upon a consistent and reliable timber supply from the Forest Service.

The stoppage of salvage timber sales, like those at issue in this case, makes it much harder for SRM and its employees to eke out a living, and could eventually put the company out of business.

The Tuolumne County Chamber of Commerce (Chamber) represents many of the business interests of Tuolumne County. Its mission is to provide leadership for a healthy and vibrant business environment and to encourage responsible economic growth that respects Tuolumne County's quality of life. The typical Chamber member is a small business with five or fewer employees. The Chamber is interested in jobs and the supply of natural resources that National Forests were created to provide. The stoppage of salvage timber sales, like those at issue in this case, hurts Chamber members by decreasing income flow into the community and putting increased pressure on local businesses to meet their bottom line, leading to layoffs and other economic stagnation. For example, the Sierra Pacific Mill in China Camp had to be converted to a fence-producing operation because of a lack of logs to continue its normal operations. This mill could easily have been shut down losing over 100 jobs in the small community.

The California Forest Counties Schools Coalition (Coalition) was founded in 1978 by the superintendents of the thirty-nine county offices of education in California that receive twenty-five percent Forest Reserve funding under the 1908 Forest Reserve Act, 16 U.S.C. § 500. The organization was created to protect the integrity and viability of this funding source for rural public schools in California. Since 1978, the Coalition has supported legislation and litigation to ensure active and sustainable management of National Forests in California. During the last 30 years, California school districts and County Offices of Education have received an average of $30 million per year from 25% Forest Reserve funding. From 1986 through 1999 those funds declined by 70% as a result of the closing down of the federal timber management program

through appeals and litigation. In 2000, Congress passed the Secure Rural School and Community Self-Determination Act, 114 Stat. 1607 (Oct. 30, 2000), and provided for those funds to schools for six years. The first source of those federal funds is actual harvest receipts. *Id.* § 102(b)(3), 114 Stat. at 1611-12. The Act expired on September 30, 2006, and forest county school districts will once again receive their 25% funds based on actual harvest receipts, which have now declined by 87%. The stoppage of any revenue-producing activity on National Forest lands, including salvage, timber sale, or biomass sales, will have a direct and negative effect on school district funding in the 39 forest counties of California.

In light of Amici's considerable silvicultural and other relevant expertise and interest, their analysis of the requirements necessary for obtaining preliminary injunctive relief will provide a necessary viewpoint to assist the Court in determining whether to grant the petition.

SUMMARY OF ARGUMENT

The Court should grant the petition for at least three reasons.

First, the Ninth Circuit's adoption of the "possibility of irreparable harm" criterion dramatically expands the equity jurisdiction of the federal courts as invested by Congress in the Judiciary Act of 1789 and as developed in the English High Court of Chancery during the eighteenth century. The expansion of the federal judiciary's equitable powers beyond their originally conceived boundaries conflicts with *Grupo Mexicano de Desarollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), and thus calls for this Court's supervisory and corrective review.

Second, the "possibility of irreparable harm" criterion applied below conflicts with decisions from other federal circuits, as well as from the Ninth Circuit itself.

Third, the Ninth Circuit improperly assessed the harm to Petitioners United States Forest Service, et al., Defendant-Intervenor Sierra Pacific Industries, and the general public, caused by preliminary injunctive relief that stops salvage timber sales throughout the National Forests. The lower court discredited and discounted the loss of revenue to the government, Sierra Pacific Industries, and Amici, as well as the harm caused by deficient forest management practices. These failures implicate the substantial federal question of how the National Forests are to be managed, meriting this Court's review.

ARGUMENT

I

THE NINTH CIRCUIT'S "POSSIBILITY OF IRREPARABLE HARM" CRITERION IS INCONSISTENT WITH THE EQUITY JURISDICTION OF THE LOWER FEDERAL COURTS AFFORDED BY THE CONSTITUTION AND THE 1789 JUDICIARY ACT

As tribunals of limited jurisdiction, federal courts are restricted both in the types of actions they may hear as well as the forms of remedies they may afford litigants. An injunction, be it preliminary or permanent, is a function of a court's equity jurisdiction. *E.g.*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982). The equity jurisdiction of the inferior federal courts is derived ultimately from Article III of the Constitution, and mediately from Section 11 of the Judiciary Act of 1789, 1 Stat. 73, 78 (Sept. 24, 1789). *See, e.g.*, *Grupo Mexicano*, 527 U.S. at 318. Their jurisdiction is coextensive with that enjoyed by the English High Court of Chancery at the time of separation between Great Britain and this country. *Id.* at 318-19. Absent authorization from Congress, the federal judiciary may not provide an equitable remedy that, in 1789, would have been

unknown to the English Chancery. *See id.* at 327, 332-33. *See also Baker v. Biddle*, 2 F. Cas. 439, 447-48, No. 764 (C.C.E.D. Pa. 1831) (Baldwin, C.J.) ("It follows that new rules subversive of established principles and practice [of equity] are excluded."). Yet the "possibility of irreparable harm" criterion adopted by the panel below raises serious questions as to whether such a lax standard is consistent with the practice of Chancery at the time of separation.

Chancery was considered to have two bases of jurisdiction, one ordinary and one extraordinary. 4 Lord Edward Coke, *Institutes of the Laws of England* 79 (1986 reprint) (1797 ed. London); *see also* 3 William Blackstone, *Commentaries* *47. The latter, from which arises the injunctive power, was firmly established long before the Bloodless Révolution of 1689. *See* 1 Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* 37-39 (13th ed. 1886) (1835).

Although Chancery had not developed a unified standard for interlocutory injunctions prior to the nineteenth century, the existence *vel non* of irreparable injury nevertheless played an important role in guiding the chancellor's decision to grant preliminary relief. *See* John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 Harv. L. Rev. 525, 527, 531 (1978). Such relief normally was provided in cases falling within three broadly defined categories: (1) injunctions staying actions in other courts; (2) injunctions pending final decisions in equity; and (3) injunctions protecting rights at law. *Id.* at 528-29. The third category contains those cases most relevant to this controversy. In those case, litigants would seek recourse in equity because the available legal remedies were inadequate, and thus without equity's intervention they would be irreparably harmed. *Id.* at 529. *Cf.* 4 Co. Inst. 84 ("Never recourse to extraordinary [jurisdiction] except where ordinary [jurisdiction] is deficient."); 1 Story, *supra*, at 40; 2 Story, *supra*, at 184. In

that manner, the requirement of irreparable injury itself became a source of equity jurisdiction. Leubsdorf, *supra*, at 530.

By the eighteenth century, Chancery was authorized to grant provisional relief either through a "common order," used (among other reasons) to constrain actions in the law courts, or through a "special order," used to protect rights at law during the pendency of a suit in equity. Note, *Probability of Ultimate Success Held Unnecessary for Grant of Interlocutory Injunction*, 71 Colum. L. Rev. 165, 166 (1971); *see* 2 Story, *supra*, at 201. These special orders, which commonly would come in cases within group (3) above, and which are the closest analogue to the preliminary injunction at issue here, were issued only after the movant had "demonstrate[d] a strong probability of immediate irreparable damage to his property." *Id. See* 2 Story, *supra*, at 229, 234.

The importance of the requirement of irreparable injury is seen in *Mogg v. Mogg*, (1786) 21 Eng. Rep. 432 (Ch.), in which the plaintiff was trustee of an estate on which the defendant had convinced the tenants thereof to cut timber. The plaintiff sued in equity to stay waste of the estate, citing to a case before Lord Camden in which the latter granted an injunction staying the waste of defendants who had claimed a right to estovers.[3] The Chancellor ruled against the *Mogg* plaintiff, distinguishing the referenced precedent on the ground that

> in that case there was a right to something in the defendants, though perhaps they carried it beyond what such right went to; and that until such right was determined, it was very proper to stay them from doing an act, which if it turned out they had no right to do, would be irreparable: but in the present case the defendant had no interest; he was a mere

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[3] "The right to use, during lease, whatever timber there may be on leased premises necessary to promote good husbandry." *Black's Law Dictionary* 651 (rev. 4th ed. 1968).

> trespasser, and being such, an action of trespass would lie against him . . . .

Id. at 432-33. The implication from Lord Thurlow's discussion is that the referenced right to estovers was slight indeed, and that it would work a great injustice to require the plaintiff to bring an action for trespass at law to restrain the defendant because the timber would be harvested in the interim.

In *Ryder v. Bentham*, (1750) 27 Eng. Rep. 1194 (Ch.), the plaintiff sued for an injunction to remove the defendant's scaffolding, which blocked the plaintiff's lights, pending the adjudication of the plaintiff's claim to light against the defendant's purported right to build upon an ancient foundation. The Chancellor granted the plaintiff preliminary relief and ordered the removal of the scaffolding, reasoning that because equity would not order the removal of a building, and if the defendant continued to construct during the pendency of the action, if the plaintiff should prove successful in the action, his lights would be permanently blocked and he would be irreparably harmed. *See id.* at 1194-95.

Perhaps an even stronger example of the importance of the imminence of irreparable injury as a condition to interlocutory relief can be found in *Johnson v. Goldswaine*, (1796) 145 Eng. Rep. 1027 (Ex.).[4] The plaintiff sought preliminary injunctive relief against defendant-lessees who threatened to carry off straw and dung from the property and excessively to plow its fields. But the court held that "this was not a case of irremediable injury, which is the only ground of this summary interposition of the Courts of Equity." *Id.* at 1028. It is fair to conclude that, given the absence of any discussion of the degree of imminence of the defendants' threats, such imminence was

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[4] The Court of Exchequer developed prior to the eighteenth century an equity jurisdiction similar to that of Chancery in which proceedings were begun by "English Bill."

taken, as a matter of course, to be a condition to obtaining a preliminary injunction.

The foregoing case law demonstrates Chancery's unwillingness to issue a preliminary injunction without a showing of a likelihood of irreparable harm. In the absence of any case supporting the position that preliminary injunctive relief may issue on the showing of a mere possibility of irreparable harm (because legal remedies may prove inadequate), and given the strong tradition apparently running counter to that position, it follows that the "debate" over the power to grant preliminary injunctive relief to stop salvage timber sales on the National Forests "should be conducted and resolved where such issues belong in our democracy: in the Congress." *Grupo Mexicano*, 527 U.S. at 333.

II

THE NINTH CIRCUIT'S "POSSIBILITY OF IRREPARABLE HARM" CRITERION CONFLICTS WITH THE STANDARD OF OTHER CIRCUITS AS WELL AS ITS OWN PRECEDENTS

In holding that a movant for preliminary injunction need show just a possibility of irreparable harm, the Ninth Circuit not only diverged from established jurisprudence in other circuits, *see* Petition for a Writ of Certiorari (USFS Pet.) at 22-23, it followed a spurious variant of its own precedents as well. As authority for its understanding of the requirements of preliminary injunctive relief, the panel relied upon the circuit's decision in *Earth Island Institute v. United States Forest Service*, 351 F.3d 1291, 1297-98 (9th Cir. 2003). That case, presenting issues very similar to those raised here, cited to *Johnson v. California State Board of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995), for the proposition that only a possibility of irreparable harm is required to qualify for

preliminary injunctive relief. *Johnson* defined the elements of preliminary injunctive relief as:

> "(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if the preliminary [injunctive] relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases)."

Id. at 1430.[5] As authority for these criteria, *Johnson* cited to *Dollar Rent A Car v. Travelers Indemnity Co.*, 774 F.2d 1371, 1374 (9th Cir. 1985). *Dollar* repeated the same four criteria and cited to *Sierra Club v. Hathaway*, 579 F.2d 1162, 1167 (9th Cir. 1978). Yet inexplicably and remarkably, *Sierra Club*'s recitation of the requisite criteria *does not* contain the "possibility of irreparable injury" element, but instead offers a combined version of *Dollar*'s elements two and three that reduces to the consideration of whether "the balance of irreparable harm favor[s] the movants."[6] *Id.* at 1167. That criterion implies that a successful movant will have shown a greater possibility of irreparable harm from the denial of injunctive relief than the nonmovant from the granting of injunctive relief.

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[5] Compare *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000), which contains the same four-part considerations but whose second criterion is that "irreparable injury will be suffered unless the injunction issues."

[6] *Sierra Club* also noted in a footnote that its discussion of the "traditional" criteria for the granting of preliminary injunctive relief also applied to the "alternative" test for the same, namely, whether there has been shown a combination of probable success and the possibility of irreparable harm or that serious questions are raised and the balance of hardships tips sharply in the movant's favor. *Sierra Club*, 579 F.2d at 1167 (citing *Wm. Inglis & Sons Baking Co. v. ITT Cont. Baking Co.*, 526 F.2d 86, 88 (9th Cir. 1975)).

The requisite degree of likelihood under *Sierra Club* seems to be much more than a mere possibility, although the court did not reach the issue in affirming the denial of the preliminary injunction in that case. *See Sierra Club*, 579 F.2d at 1169. The court cited to *Warm Springs Dam Task Force v. Gibble*, 565 F.2d 549, 551 (9th Cir. 1977) (per curiam), which contains the same three-part division and omits the "possibility of irreparable harm" prong. *Warm Springs*, which concerned an action under the National Environmental Policy Act (NEPA), denied an injunction pending appeal because the plaintiffs had failed to show that they "w[ould] suffer significant harm." *Id.* at 551. A similar result obtained in *Alpine Lakes Protection Society v. Schlapfer*, 518 F.2d 1089, 1090 (9th Cir. 1975) (per curiam), relied upon by *Warm Springs*. In *Alpine Lakes* the court affirmed the denial of a preliminary injunction to NEPA plaintiffs *notwithstanding* that the plaintiffs had alleged that they would suffer irreparably; the court reasoned that the defendants would suffer even more. *See Alpine Lakes*, 518 F.2d at 1090. The case law trail runs cold, however, with *Alpine Lake*'s citation to *Schwartz v. Covington*, 341 F.2d 537, 538 (9th Cir. 1965), which states without citation that the injunction movant must show that "he will suffer irreparable damage if the stay is not granted"; that statement, although not quite the equivalent of *Sierra Club*'s "balance of irreparable harm" criterion, is a long way from *Dollar*'s (and ultimately *Earth Island*'s) "possibility of irreparable harm" requirement.

Thus, the Ninth Circuit's adoption of the "possibility of irreparable harm" criterion conflicts with the case law of other circuits as well as itself: review by this Court is merited.

III

THE NINTH CIRCUIT'S BALANCING OF HARMS AND ASSESSMENT OF THE PUBLIC INTEREST ARE INCONSISTENT WITH THE CONGRESSIONALLY MANDATED MULTIPLE-USE PARADIGM FOR THE NATIONAL FORESTS

In directing the lower court to issue preliminary injunctive relief in favor of Respondents, the Ninth Circuit discounted the deleterious effects that the injunction will have, not only on Petitioners, but on the affected local community, as well as timber management of the National Forests generally. The Ninth Circuit improperly accorded the putative environmental harm "trump" status without considering the potential corresponding harm that may accrue to persons and entities such as Petitioners and Amici.

Amicus California Forest Counties Schools Coalition is just one example of how the Ninth Circuit's insensitivity to competing interests may produce substantial harm. The Coalition depends upon funds generated from timber sales such as those at issue here to provide essential funding for the education of children, through legislation such as the Forest Reserve Act, *supra*, and the Secure Rural School and Community Self-Determination Act, *supra*. By dismissing countervailing considerations as mere "economic harms," the Ninth Circuit here improperly discounted the real and harmful effect that stoppage of timber sales on the National Forests have on school children.

The Ninth Circuit's analysis is also inconsistent with the multiple-use paradigm envisioned by Congress for the National Forests. That system was established by the Organic

Administration Act of 1897,[7] 30 Stat. 34 (June 4, 1897), which, with minor modifications and as codified in the United States Code, declares:

> No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States . . . .

16 U.S.C. § 475. Congress's views as expressed in the Act are consonant with the findings of the National Forest Commission, issued in a report published in the months leading up to the Act's passage:

> These great bodies of reserved lands cannot be withdrawn from all occupation and use. They must be made to perform their part in the economy of the Nation. Unless the reserved lands of the public domain are made to the contribute to the welfare and prosperity of the country, they should be thrown open to settlement and the whole system of reserved forest abandoned.

Quoted in Huffman, *supra*, at 263.

As the twentieth century progressed, concerns were raised that the National Forests were not managed in a manner sufficiently sensitive to environmental concerns. Partly in response to those concerns, Congress passed the Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215 (June 12, 1960), the Wilderness Act of 1964, 78 Stat. 890 (Sept. 3, 1964), and the National Forest Management Act of 1976, 90 Stat. 2949

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[7] The system's formal origins can be traced to the Act of March 3, 1891, 26 Stat. 1095, which invested the President with the power to reserve public timber lands. *See* James L. Huffman, *A History of Forest Policy in the United States*, 8 Envtl. L. 239, 258 (1978).

(Oct. 22, 1976). But none of these laws displaced timber production as the primary use of the National Forests. The Multiple-Use Act provides that it is congressional policy to administer the National Forests "for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C. § 528. Yet Congress in the same Act was careful to describe these purposes as "supplemental to, but not in derogation of," *id.* § 528, the principal purposes for which the National Forests were established, namely, a steady supply of timber for the country. Similarly, the Wilderness Act merely underscores that one of the legitimate uses of federal lands (but by no means the paramount use) is the preservation of areas in their natural state. *See* 16 U.S.C. § 1131(a); *Parker v. United States*, 448 F.2d 793, 795 (10th Cir. 1971) (Wilderness Act "is simply a congressional acknowledgment of the necessity of preserving one factor of our natural environment . . . until it can be determined wherein the balance between proper multiple uses of the wilderness lies and the most desirable and highest use established for the present and future."). And arguably the same is true of the National Forest Management Act. *See* 16 U.S.C. § 1600(3) (Congressional finding that the Act's "renewable resource program must be based on a comprehensive assessment of present and anticipated uses, demand for, and supply of renewable resources from the Nation's public and private forests and rangelands, through analysis of environmental and economic impacts, coordination of multiple use and sustained yield opportunities as provided in the Multiple-Use Sustained-Yield Act of 1960 . . . and public participation in the development of the program.").

The management of the National Forests to maximize sustainable timber production as well as impose sound management systems were goals consistent with the expectations of two leading proponents of that system, President Theodore Roosevelt, and the famed naturalist and Sierra Club founder John Muir.

Roosevelt, in a 1903 speech before the Society of American Foresters, remarked:

> First and foremost, you can never afford to forget for one moment what is the object of the forest policy. Primarily that object is not to preserve forests because they are beautiful—though that is good in itself—not to preserve them because they are refuges for the wild creatures of the wilderness—though that too is good in itself—but the primary object of the forest policy as of the land policy of the United States, is the making of prosperous homes, is part of the traditional policy of home-making of our country. Every other consideration comes as secondary. The whole effort of the government in dealing with the forests must be directed to this end, keeping in view the fact that it is not only necessary to start the homes as prosperous, but to keep them so. That is the way the forests have need to be kept.

A Compilation of the Messages and Speeches of Theodore Roosevelt 1901-1905, at 208 (A.H. Lewis ed., 1906).

John Muir expressed similar sentiments:

> The forests must be, and will be, not only preserved, but used; and . . . like perennial fountains . . . be made to yield a sure harvest of timber, while at the same time all their far-reaching [beneficent] uses may be maintained unimpaired.

Quoted in Ben A. Minteer & Robert E. Manning, *Reconstructing Conservation: Finding Common Ground* 198 (2003). And on the point of good forest management, a subject directly implicated by the salvage timber sales here at issue, Muir urged:

> The underbrush and young trees will grow up as they are growing in Yosemite, and unless they are kept under control the danger from some chance fire, from lightning, if from no other source, will become greater from year to year. The larger trees will then be in danger. Forest management must be put on a rational, permanent scientific basis, as in every other civilized country.

John Muir, *The National Parks and Forest Reservations*, Sierra Club Bulletin (1896), *available at* http//:www.sierraclub.org (last visited Jan. 29, 2007).

The Ninth Circuit's inadequate balancing of hardships and assessment of the public interest prior to an adjudication of the merits of Respondents' claims is perhaps all the more deficient in light of a recently published study in the *Journal of Forestry* which reviewed 729 cases filed in federal district courts from 1989 to 2002 challenging Forest Service management. The study found that the Forest Service won 57.6% of all cases, and 73% of the 575 cases decided by federal judges. *See* Denise M. Keele, et al., *Forest Service Land Management Litigation 1989-2002*, Journal of Forestry 196-202 (June 2006). And yet, not every case makes it to the merits stage, especially in circumstances such as those present here where the enjoined timber harvests are of salvage timber, whose value and marketability plummet if not cut quickly. *See* Brief of Respondent Sierra Pacific Industries in Support of Petition at 11-12. In that instance, enterprising litigants can obtain a preliminary injunction—which operates as the functional equivalent of a permanent injunction once the proposed salvage timber becomes unusable—and thus effectively win their case without having its merits adjudicated. The injustice presented by that hypothetical is significant given that, in the Ninth Circuit, a preliminary injunction can be obtained simply by establishing a "fair chance of success." *Johnson*, 72 F.3d at

1430 (quoting *Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 675 (9th Cir. 1984)).

In sum, the Ninth Circuit's dismissive estimation, *see* App. at 55a, of the hardships to be endured as a result of the preliminary injunction cannot be squared with the statutory and political history of the country's National Forest system, in which productive and renewable uses of the nation's forests have been of great concern to Congress. Similarly, the panel's conclusion that preservation of the environment necessarily assures that the preliminary injunction is in the public's interest fails sufficiently to account for the public's interest in the productive use of the National Forests.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari filed by the United States Forest Service, et al.

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Respectfully submitted,

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